

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY FIFTY-NINE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, May 13, 2015
9:36 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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I N D E X

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P R O C E E D I N G S

THE CLERK: All rise for the Court and the jury.

(The Court and jury enter the courtroom at 9:36 a.m.)

THE CLERK: Be seated.

THE COURT: Good morning, jurors.

THE JURORS: Good morning, your Honor.

THE COURT: Once again, I will ask you whether you have all faithfully abided by my instructions to avoid any discussion of the case with anyone, including yourselves. Is that true?

THE JURORS: Yes.

THE COURT: And, again, have you also insulated yourself, as far as practicable, from any media accounts of the case?

THE JURORS: Yes.

THE COURT: Yes? All right.

Members of the jury, it is again my duty to instruct you as to the law applicable to this sentencing phase of the case. The sole question before you is whether Dzhokhar Tsarnaev should be sentenced for his capital offenses to either the death penalty or to life imprisonment without the possibility of release.

There is no parole in the federal system. Life without possibility of release means just that.

The choice between these very serious alternatives is

1 yours, and yours alone, to make. If you determine on any
2 particular count that Mr. Tsarnaev should be sentenced to death
3 or that he should be sentenced to life imprisonment without the
4 possibility of release, the Court is required to impose
5 whatever sentence you choose as to that count.

6 Remember that you have previously found Mr. Tsarnaev
7 guilty of the following capital counts in the indictment:
8 Counts 1 through 10 and Counts 12 through 18. Substantively,
9 those counts are conspiracy to use a weapon of mass destruction
10 resulting in death, use of a weapon of mass destruction
11 resulting in death, conspiracy to bomb a place of public use
12 resulting in death, bombing of a public place -- place of
13 public use resulting in death, malicious destruction of
14 property resulting in personal injury and death, and possession
15 and use of a firearm during and in relation to a crime of
16 violence resulting in death.

17 Even though there are a total of 17 capital counts at
18 issue here, you must still approach the sentencing decisions
19 before you separately as to each count.

20 I stress to you the importance of you giving careful
21 and thorough consideration to all of the evidence. As I
22 previously said to you, you must follow the principles of law
23 given to you in these instructions, regardless of any other
24 thought or opinion you may have as to what the law may be or
25 should be.

1 The instructions I am giving you now are a complete
2 set of instructions on the law applicable to the sentencing
3 decision as to Mr. Tsarnaev. During your deliberations, you
4 should, thus, rely on these instructions.

5 We've also prepared a special verdict form that you
6 must complete. The form details the special findings you must
7 make, and it will aid you in properly performing your
8 deliberative duties.

9 Now, although Congress in the relevant statute has
10 left it wholly to you, the jury, to decide Mr. Tsarnaev's
11 proper punishment, it has narrowed and channeled your
12 discretion in specific ways by requiring you to consider and
13 weigh any aggravating and mitigating factors that are present
14 in this case.

15 As I explained previously, aggravating and mitigating
16 factors pertain to the circumstances of the crime or the
17 personal traits, character or background of Mr. Tsarnaev or
18 anything else relevant to the sentencing decision.

19 Aggravating factors are those that would tend to
20 support imposition of the death penalty. By contrast,
21 mitigating factors are those that suggest life in prison
22 without the possibility of release is an appropriate sentence
23 in this case.

24 By requiring you to consider what aggravating factors
25 and mitigating factors are present in this case, the statute

1 requires that you make a unique, individualized choice between
2 the death penalty and life in prison without the possibility of
3 release as to the appropriate sentence for the crimes
4 Mr. Tsarnaev has been convicted of.

5 The government at all times and as to each capital
6 count has the burden of proving its sentencing allegations
7 against the defendant beyond a reasonable doubt. I have
8 previously instructed you about proof beyond a reasonable
9 doubt. Let me remind you of those instructions.

10 The requirement of proof beyond a reasonable doubt is
11 a strict and heavy burden, but it is not an impossible one. It
12 does not require the government to prove a necessary fact or
13 proposition beyond all possible, hypothetical or speculative
14 doubt. There are probably very few, if any, things in human
15 affairs that can be proved to an absolute certainty. The law
16 does not require that. But the evidence must exclude, in your
17 minds, any reasonable doubt about the existence of the fact or
18 proposition in question.

19 A reasonable doubt may arise from the evidence
20 produced or from a lack of evidence. If you conclude that the
21 evidence may reasonably permit alternate conclusions with
22 respect to the fact or proposition in question, then the
23 government has not proved that fact or proposition beyond a
24 reasonable doubt.

25 Reasonable doubt exists when, after you've considered,

1 compared and weighed all the evidence using your reason and
2 your common sense, you cannot say that you have a settled
3 conviction that the fact or proposition is true or correct.
4 Conversely, we say a fact is proved beyond a reasonable doubt
5 if, after careful consideration of all the evidence, you are
6 left with a settled conviction based on the evidence and your
7 reasoning about it that the fact or proposition is correct.

8 While the law does not require proof that overcomes
9 every conceivable or possible doubt, it is not enough for the
10 government to show that the fact or proposition it argues for
11 is probably true. The government's burden is to convince you
12 that there is no reasonable doubt that the fact or proposition
13 it argues for is correct.

14 A defendant never has the burden of disproving the
15 existence of anything which the government must prove beyond a
16 reasonable doubt. The burden is wholly upon the government.
17 The law does not at all require Mr. Tsarnaev to produce
18 evidence that a particular aggravating factor does not exist or
19 that death is not the appropriate sentence.

20 However, in this case, as he is entitled to do,
21 Mr. Tsarnaev asserts that there are mitigating factors that
22 should lead you to conclude that, all things considered, the
23 death penalty is not the appropriate punishment for his
24 offenses. It is the defendant's burden to establish any
25 mitigating factor by a preponderance of the evidence.

1 Requiring something to be proved by a preponderance of
2 the evidence is a lesser standard of proof than proof beyond a
3 reasonable doubt. To prove something by a preponderance of the
4 evidence is to prove that it is more likely true than not; that
5 it is supported by the greater weight of the reliable evidence.
6 If, however, the evidence is equally balanced as to a
7 mitigating fact or proposition, the defendant will not have
8 carried the burden of proving the fact or proposition by a
9 preponderance of the evidence. The preponderance of the
10 evidence is not determined by the number of witnesses or the
11 volume of evidence, but by the quality and persuasiveness of
12 the relevant evidence.

13 In making the determinations you're required to make
14 at this stage, you must consider the information presented
15 during this penalty phase. You may also consider the evidence
16 previously admitted in the prior liability phase. Let me
17 provide some reminders about evidence and how to think about
18 the evidence that you will remember from the first phase of the
19 trial.

20 First I'll remind you what is not evidence. The
21 lawyers' summaries of the evidence in their openings, when
22 they're telling you what they expect the evidence will be, and
23 now, today, in their closings, when they try to recall it for
24 you, are not part of the evidence. The summaries are an
25 attempt to marshal the evidence for you, to try to persuade you

1 to understand it in a way that is consistent with their view of
2 the case. But to the extent your collective appreciation of
3 the evidence differs in any way from the way the lawyers have
4 predicted it or argued it, it is your understanding and your
5 assessment of the evidence that controls.

6 What the lawyers say in their closing statements
7 cannot add or subtract -- add to or subtract from the evidence.
8 You have heard the evidence, and it is your judgment on that
9 evidence that matters.

10 I told you at the beginning, and you have seen, that
11 I'd be ruling on any questions of the admissibility of evidence
12 as they have arisen. I remind you there is no significance,
13 for your purposes, to any of the rulings, either admitting or
14 excluding evidence. Those considerations are wholly separate
15 from the kinds of decisions you'll have to make, and you should
16 give no consideration of significance to any of my evidence
17 rulings.

18 I remind you that evidence that is offered but not
19 admitted is not to be considered by you. Similarly, questions
20 by the attorneys which are not answered by the witness produce
21 no evidence.

22 The indictment is not evidence. Anything you may have
23 read in the press, seen on television, heard on the radio,
24 viewed online or heard from others outside the courtroom at any
25 point is, of course, not evidence.

1 You have repeatedly assured me that you have abided by
2 my instructions to avoid such information which is not part of
3 the evidence in the case. To the extent you had any prior
4 impressions of the facts of this case from the time before you
5 were called to be jurors, you must completely set aside any
6 such impressions. Again, in the jury selection process, you
7 assured me that you could do that; and, frankly, I had -- if I
8 had not trusted your answers in that respect, you would not be
9 sitting here today. Your focus as you deliberate must be
10 entirely and exclusively on the body of evidence produced in
11 the course of the trial. It would be unfair and a violation of
12 your jurors' oath to do otherwise.

13 Let me now address some of the things that are
14 information or evidence for you to evaluate in this stage of
15 the case. You have a very large number of exhibits in the
16 case. You'll have access to all the exhibits that have been
17 admitted in evidence in both phases of the trial, and you may
18 consider those exhibits and give them whatever weight, value or
19 significance you think they are fairly entitled to receive.
20 The judgment is entirely yours.

21 The digital exhibits, which is a technical matter, can
22 be put on the JERS system, which you used in your prior
23 deliberations; will again be available to you via the monitor
24 in the jury room. Because of some certain technical
25 limitations, some other exhibits are available to you by means

1 of a laptop computer, which does not have any other programs or
2 capabilities, such as word-processing or the Internet --
3 Internet access. And I remind you there's no significance
4 regarding which exhibits are on JERS and which are on the
5 laptop.

6 Many exhibits in the case have been physical exhibits
7 or actual items. As before, those are available to you as
8 well. If you would like to view any of the physical exhibits,
9 you shall simply write a note indicating what exhibit or
10 exhibits you would like to view and give it to the court
11 security office, and we'll arrange for you to view those
12 exhibits.

13 Remember that sometimes a particular item of evidence
14 is received for a limited purpose rather than for general
15 consideration. For example, some of the exhibits were admitted
16 under a limitation that they could be considered as evidence
17 that a particular event occurred, for example, that somebody
18 said something on a particular occasion, but not as evidence
19 that any affirmative assertion contained in that evidence was
20 accurate or true.

21 Of course, in addition to the exhibits, you have the
22 testimony of the witnesses who appeared here in the courtroom
23 and one via videoconference from abroad, who answered questions
24 that were put to them. You ought to give the testimony of each
25 witness whatever weight, value or significance in your judgment

1 it is fairly entitled to receive. With respect to each
2 witness, you should think about the testimony and decide how
3 much value or meaning it ought to have to fair-minded people
4 like yourselves who are looking for the truth.

5 You may find, as you think about the evidence from any
6 particular witness, that you find credible, reliable or
7 meaningful just about everything that the witness has said,
8 perhaps just about nothing that the witness has said, and
9 perhaps something in between. Maybe there are some things from
10 a particular witness you find credible and reliable and other
11 things from the same witness you're more skeptical of or
12 doubtful about. There is no automatic rule. You don't have to
13 accept any given witness's testimony in total or reject it in
14 total. You should think about the testimony itself and accept
15 what is meaningful and reliable and reject what is not.

16 In deciding the credibility of a witness, you may
17 consider the witness's appearance or demeanor on the witness
18 stand as he or she testified, to the extent any such
19 observations may have any bearing on your assessment of the
20 reliability of that evidence. The appearance or demeanor of
21 other people in the courtroom, including the defendant, the
22 lawyers for each side, spectators in the gallery or even me,
23 should not be taken by you as evidence for any proposition or
24 conclusion in the case.

25 You may also take into account any partiality or bias

1 that a witness might have toward one side or the other. Does
2 the witness have any reason, motive or interest in the outcome
3 of the case or anything else that would lead the witness to
4 favor one side or the other in the testimony? A tendency to
5 favor one side or the other might be deliberate, an intentional
6 effort to favor one side, or it might be unconscious, arising
7 out of some affiliation or affinity with one side or the other.
8 Again, such tendencies could affect the reliability of the
9 testimony, and you ought to consider whether there has been
10 such an effect with respect to the testimony you've heard.

11 Again, keep in mind in every case there are people who
12 have an association or connection with one side or the other,
13 and it is not automatic, of course, that people -- those people
14 must therefore be distrusted. But potential bias or
15 partiality, conscious or unconscious, by a witness is a factor
16 that you can think about in evaluating the evidence.

17 You have heard testimony from witnesses described
18 generally as experts. An expert witness is a witness who has
19 special knowledge or experience that allows the witness to
20 testify about matters within his or her expertise and to give
21 an opinion about the issues in the case based on his or her
22 knowledge and experience. You should evaluate the testimony of
23 an expert witness with the same care that you employ in
24 evaluating the testimony of any other witness. You may accept
25 or reject testimony of an expert witness as you judge is

1 appropriate.

2 In weighing expert testimony, you should consider the
3 factors that generally bear upon the credibility of witnesses
4 as well as the particular expert's qualifications, such as
5 education and experience, the soundness of the reasons given
6 for any opinion and any other evidence in the case that you
7 consider pertinent. Remember that you alone decide how much of
8 a witness's testimony to believe and how much weight it should
9 be given.

10 You have heard the testimony of a number of law
11 enforcement officials. The fact that a witness may be employed
12 as a law enforcement official does not mean that his or her
13 testimony is deserving of either more or less consideration or
14 greater or less weight than any other witness. It is
15 legitimate for defense counsel to question the credibility or
16 reliability of a law enforcement witness on the ground that his
17 or her testimony may be colored by personal or professional
18 interest in the outcome of the case. As with any witness, it
19 is up to you, after considering the matter, whether to accept
20 and rely on the testimony of a law enforcement witness, just as
21 with any other witness.

22 Consider the evidence as a whole. You ought to
23 consider the evidence from each witness not only by itself, in
24 isolation, as if that witness were the only person to testify,
25 but also in the context of all the other evidence you have

1 heard. For example, there might be a piece of evidence about
2 which you were originally skeptical, and then you might hear
3 other evidence that leads you to reexamine your initial
4 impression, and you being to trust the questioned evidence a
5 bit more.

6 The opposite might happen, of course. You might tend
7 to accept something that sounds pretty good at first. Then you
8 consider other pieces of evidence; you might begin to doubt
9 what you had first accepted. So, again, think of the evidence
10 sensibly as a whole as you make sound judgments about it.

11 You may make inferences from the evidence. An
12 inference is simply a conclusion that you might draw from the
13 available information that you have found to be reliable. You
14 will recall I illustrated this point in my instructions at the
15 end of the first phase of the trial by pointing out that you
16 could draw an inference about how hot a stove burner is from
17 the observation of steam coming out of the teakettle on the
18 burner. You must be careful that any inferences that you draw
19 are those that are genuinely supported by the information you
20 are relying on to make the inference.

21 An inference, and consequently proof of a fact by
22 circumstantial evidence, cannot be an excuse for guessing or
23 speculating. If there are alternate possible inferences from
24 the evidence, you can't just pick one you happen to like. You
25 have to be persuaded that any inference that you make is

1 superior to other possible inferences based on the same
2 evidence and information.

3 And, of course, to the extent that you rely in a
4 criminal case on an inference by circumstantial evidence, in
5 the end, any conclusions accepting the government's
6 propositions must be those that convince you beyond a
7 reasonable doubt.

8 Finally, I remind you that you will have the notes
9 that you have taken in both phases of the trial. As before, do
10 not assume that simply because something appears in somebody's
11 notes it necessarily took place in the courtroom. Instead, it
12 is your collective memory with respect to the information
13 that -- evidence presented that must control.

14 As I have previously instructed you, a defendant has a
15 constitutional right not to testify. There may be many reasons
16 why a defendant would choose to invoke and exercise that right.
17 You may not, under any circumstance, draw any inference or
18 presumption against a defendant from his decision to invoke
19 that right and to decline to testify. Accordingly, it should
20 not be considered by you in any way or even discussed in
21 arriving at any aspect of your sentencing decision, including
22 the existence or nonexistence of an alleged aggravating or
23 mitigating factor.

24 You must deliberate and determine the appropriate
25 sentence for each of the capital counts individually. Although

1 I will be discussing the capital counts as a group, your
2 findings as to Mr. Tsarnaev's age, the gateway factors,
3 aggravating factors and all the other issues pertaining to
4 those counts must address each of the counts individually.

5 It is possible that, although there may be parallels
6 or connections between some counts, you may also find
7 differences that would justify different sentences on different
8 counts. You should understand, however, that if you impose the
9 death penalty as to any count or counts, the death sentence
10 will control, regardless of any life sentence or sentence that
11 might be -- sentences that might be imposed on other counts.

12 As you know, there are 17 counts concerning a total of
13 four homicides. You should not attach any significance to the
14 fact that these four homicides have given rise to more than
15 four capital counts. The government is entitled to bring
16 multiple charges with respect to each homicide, but the number
17 of counts does not by itself mean that the defendant's conduct
18 is more blameworthy or that he is deserving of greater
19 punishment.

20 The instructions that I am going to give you, as well
21 as the verdict form that you will be completing, will address
22 first -- will first address your findings, if any, with respect
23 to the defendant's age at the time of the offenses, the four
24 so-called gateway factors, and the statutory aggravating
25 factors identified by the government with respect to each

1 capital count.

2 The instructions on the verdict form thereafter
3 address your findings, if any, as to each capital count
4 regarding the existence of any non-statutory aggravating
5 factors and mitigating factors, as well as the weighing of
6 aggravating and mitigating factors.

7 So let me now discuss with you in summary form, first,
8 the deliberative steps that you must follow in considering the
9 issues before you as to each capital offense. I will then
10 discuss in greater detail each of these steps.

11 First, you will consider whether the government has
12 proven beyond a reasonable doubt and to your unanimous
13 satisfaction that the defendant was at least 18 years old at
14 the time of the capital offenses for which you have found him
15 guilty.

16 Second, you will consider, as appropriate, whether the
17 government has proven beyond a reasonable doubt and to your
18 unanimous satisfaction one or more threshold intent factors or
19 gateway factors established by Congress as to each of the
20 capital offenses for which you have found the defendant was at
21 least 18 years old at the time of the capital offense.

22 Third, you will consider, as appropriate, whether the
23 government has proven beyond a reasonable doubt and to your
24 unanimous satisfaction at least one statutory aggravating
25 factor alleged as to each of the capital offenses for which you

1 have found the defendant was at least 18 years of age at the
2 time of the capital offense and have found the existence of at
3 least one gateway factor.

4 Fourth, you will consider, as appropriate, whether any
5 non-statutory aggravating factors identified by the government
6 have been proven beyond a reasonable doubt and to your
7 unanimous satisfaction as to each of the capital offenses for
8 which you have found the defendant was at least 18 years of age
9 at the time of the offense and have also found the existence of
10 at least one gateway factor and the existence of at least one
11 statutory aggravating factor.

12 Fifth, you will consider, as appropriate, whether any
13 of you individually or together with other jurors find that the
14 defendant has proved, by a preponderance of the evidence, any
15 mitigating factor or factors.

16 Sixth, if you have found the defendant was at least 18
17 years of age at the time of the particular offense under
18 consideration, and at least one gateway factor and at least one
19 statutory aggravating factor, you must then weigh the
20 aggravating factors, statutory and non-statutory, that you have
21 unanimously found to exist and any mitigating factors that you
22 personally have found to exist to determine the appropriate
23 sentence.

24 You must decide, in regard to that particular capital
25 offense, whether the aggravating factors that have been found

1 to exist sufficiently outweigh the mitigating factors found to
2 exist for that offense so as to justify imposing a sentence of
3 death on the defendant for that offense; or, if you do not find
4 any mitigating factors, whether the aggravating factors alone
5 are sufficient to justify imposing a sentence of death on the
6 defendant for that offense.

7 Now let me give you some greater detail. Excuse me.
8 I'm fighting a spring cold here at an inopportune time.

9 Before you may consider the imposition of the death
10 penalty, you must first unanimously agree beyond a reasonable
11 doubt that Mr. Tsarnaev was 18 years of age or older at the
12 time of the offense.

13 I'm going to put on your monitors because we're going
14 to display for you the verdict slip that you will be filling
15 out because I think it may help you to track these instructions
16 as I go through them.

17 So in the event that you unanimously find beyond a
18 reasonable doubt that Mr. Tsarnaev was 18 years of age or older
19 at the time of the offenses as to all counts, you are to
20 indicate that finding on the appropriate line in Section I of
21 the verdict form. And you'll see that's the top line, the
22 first one of the three.

23 In the event that you unanimously find beyond a
24 reasonable doubt that he was 18 years of age or older at the
25 time of the offenses as to some of the counts but not others,

1 you're to indicate that finding on the appropriate line in
2 Section I of the verdict form and also identify on the line
3 provided, by count number, those specific counts as to which
4 you find that he was at least 18. And that, you will see, is
5 the third option.

6 If you do not unanimously find the government has
7 proven beyond a reasonable doubt that the defendant was 18
8 years of age or older as to any of the capital counts, then no
9 further deliberations will be necessary as to any such count.
10 And you see that's the second option: "We find unanimously
11 that the age has not been proved as to any." So you have the
12 three options to consider, and you'll indicate which represents
13 your decision.

14 Again, before you may consider the imposition of the
15 death penalty for any capital count, you must unanimously find
16 beyond a reasonable doubt the existence as to that count of one
17 of the so-called -- four so-called gateway factors, sometimes
18 also referred to as threshold intent factors, alleged by the
19 government.

20 The gateway factors alleged by the government are as
21 follows, and they're reproduced on the verdict form in
22 Section II: First, that Mr. Tsarnaev intentionally killed the
23 victim or victims of that particular capital offense charged in
24 the respective count of the indictment; or, Number 2, that
25 Mr. Tsarnaev intentionally inflicted serious bodily injury that

1 resulted in the death of the victim or victims identified in
2 the particular offense charged in the respective count of the
3 indictment; or that Mr. Tsarnaev intentionally participated in
4 an act contemplating that the life of a person would be taken
5 or intending that lethal force would be used in connection with
6 a person other than one of the participants in the offense, and
7 the victim or victims of the particular capital offense charged
8 in the respective account of the indictment died as a direct
9 result of that act; and, fourth -- or, fourth, that
10 Mr. Tsarnaev intentionally and specifically engaged in an act
11 of violence, knowing that the act created a grave risk of death
12 to a person other than one of the participants in the offense
13 such that participation in the act constituted a reckless
14 disregard for human life, and the victim or victims of the
15 particular capital offense charged in the respective count of
16 the indictment died as a direct result of that act.

17 Your findings as to whether the government has proven
18 the existence beyond a reasonable doubt of a particular factor
19 from among those four gateway factors must be individual and
20 unanimous as to each capital count.

21 With regard to your findings, you may not rely solely
22 on your first-phase verdict of guilt or your factual
23 determinations in that phase. Instead, you must now each
24 consider and decide the issue again for the purposes of this
25 trial.

1 Any finding that a gateway factor has been proven as
2 to a particular capital count must be based on Mr. Tsarnaev's
3 personal actions and intent and not on the actions or intent of
4 anyone else. Intent or knowledge may be proved like anything
5 else. You may consider any statements made or acts done by
6 Mr. Tsarnaev and all the facts and circumstances in evidence
7 which may aid in a determination of Mr. Tsarnaev's knowledge or
8 intent. You may, but are not required to, infer that a person
9 intends the natural and probable consequences of acts knowingly
10 done or knowingly omitted.

11 In the event you unanimously find beyond a reasonable
12 doubt that a particular gateway factor exists as to all the
13 capital counts, you're to indicate that finding on the
14 appropriate line in Section II of the verdict form. I think
15 you'll see, again, that is presented as the first of the
16 multiple choices.

17 In the event that you unanimously find beyond a
18 reasonable doubt that a particular gateway factor exists as to
19 some but not all of the capital counts, you're to indicate that
20 finding on the appropriate line in Section II and also identify
21 on the line provided, by the count number, the specific counts
22 as to which you find the gateway factor applies. You'll see
23 that's the third choice presented again.

24 If you do not unanimously find a particular gateway
25 factor has been proved beyond a reasonable doubt and with

1 respect to any of the capital counts, you shall mark the
2 appropriate space in Section II, and that will be the second
3 option of the three.

4 I instruct you that any gateway factor found by you to
5 exist is not an aggravating factor -- that's a separate matter.
6 These are gateway factors -- and may not be considered by you
7 in the process of weighing any aggravating and mitigating
8 factors in ultimately deciding whether or not to impose a
9 sentence of death.

10 And for any capital count, if you do not unanimously
11 find that the government has proven beyond a reasonable doubt
12 the existence as to that count of any of the four gateway
13 factors, your deliberative task is -- as to that capital count
14 is over, and I will impose a mandatory sentence of life
15 imprisonment without the possibility of release.

16 Now let me turn to the statutory aggravating factors.
17 If you unanimously find the government has proven beyond a
18 reasonable doubt that at least one of the four gateway factors
19 exists as to a particular capital count and that the defendant
20 was 18 years or older at the time of the offense, you must then
21 proceed to determine whether the government has proven beyond a
22 reasonable doubt the existence of any of the following
23 statutory aggravating factors with respect to the same count.
24 You may consider only statutory aggravators alleged as to the
25 offenses for which you have found the defendant was 18 years

1 old and for which you have found at least one gateway factor.

2 The government alleges as a statutory aggravating
3 factor for each capital offense that the death or deaths
4 occurred during the commission of another crime or crimes. The
5 government alleges as a statutory aggravating factor for each
6 capital offense, Counts 1 through 10 and 12 through 18, that
7 Mr. Tsarnaev knowingly created a grave risk of death to one or
8 more persons in addition to the victim of the offense in the
9 commission of the offense and in escaping apprehension for the
10 violation of the offense.

11 The government alleges, as to Counts 1 through 10 and
12 12 through 15, excluding those that exclusively charge the
13 death of Sean Collier, that Mr. Tsarnaev committed the offense
14 in an especially heinous, cruel and depraved manner and that it
15 involved serious physical abuse to the victim; that he
16 committed the offense after substantial planning and
17 premeditation to cause the death of a person and to commit an
18 act of terrorism; and that he intentionally killed and
19 attempted to kill more than one person in a single criminal
20 episode.

21 The government also alleges, as to Counts 1, 4, 5, 6,
22 9, 10, 14 and 15, those involving the death of Martin Richard,
23 that the defendant is responsible for the death of a victim,
24 Martin Richard, who was particularly vulnerable due to youth.

25 At this step, the law directs you to consider and

1 decide separately, as to each of the capital counts for which
2 you have unanimously found that the defendant was at least 18
3 at the time of the crime and the existence of at least one
4 gateway factor, whether the government has proved to you
5 unanimously and beyond a reasonable doubt the existence of any
6 one or more of the statutory aggravating factors that are
7 specifically alleged.

8 Any finding that one or more of these factors has been
9 proven must be based on Mr. Tsarnaev's personal actions and
10 intent. In making your findings regarding the statutory
11 aggravating factor, you may not rely solely on your previous
12 verdict of guilt or your factual determinations therein.
13 Instead, you must now consider and decide the issues presented
14 in the present context.

15 In the event that you find unanimously beyond a
16 reasonable doubt that a particular statutory aggravating factor
17 exists as to all relevant capital counts for which you have
18 found the defendant was age 18 or older and the existence of at
19 least one gateway or threshold intent factor, you are to
20 indicate that finding on the appropriate line in Section III of
21 the verdict form. And, again, you will see that is presented
22 as the first of the three options.

23 In the event you unanimously find beyond a reasonable
24 doubt that a particular statutory aggravating factor has been
25 proven as to some but not all of the relevant capital counts

1 for which you have found the evidence of at least one gateway
2 factor or threshold intent factor, you ought to indicate that
3 finding on the appropriate line in Section III of the verdict
4 form. You're also to identify on the line provided, by count
5 number, those particular counts as to which you have found the
6 statutory aggravating factor applies.

7 If you do not unanimously find that a particular
8 statutory aggravating factor has been proved beyond a
9 reasonable doubt with respect to any of the relevant capital
10 counts that you're considering, you should mark that in the
11 appropriate space in Section III of the verdict form.

12 If you do not unanimously find that, as to any capital
13 count, the government has proved the existence of at least one
14 statutory aggravating factor, then your deliberative task on
15 that count will be over and I will impose a mandatory sentence
16 on that count of life imprisonment without the possibility of
17 release.

18 Let me now set forth for you in detail the specific
19 elements necessary for the government to prove any of the
20 alleged statutory aggravating factors.

21 The government alleges, as to all of the capital
22 counts, that death or injury resulting in death occurred during
23 the commission of or during the immediate flight from the
24 commission of another offense or offenses. Specifically, the
25 government alleges that the death or deaths occurred during the

1 commission of a conspiracy to use a weapon of mass destruction
2 in violation of Title 18, United States Code, Section 2332(a)
3 or during the commission or immediate flight from the
4 commission of the use of a weapon of mass destruction, also a
5 violation of Title 18 of the United States Code,
6 Section 2332(a).

7 With regard to Counts 1 through 10 and 12 through 15,
8 that is the counts not addressed specifically to the death of
9 Sean Collier, the government alleges, in the alternative, that
10 the death occurred during the commission or during the
11 immediate flight from the commission of the destruction of
12 property affecting interstate commerce by explosive, a
13 violation of Title 18 of the United States Code,
14 Section 844(i).

15 Though you have already, in the prior phase, convicted
16 the defendant of those crimes, I will summarize for you again
17 the elements of those offenses so that you can determine
18 whether the deaths alleged occurred during the course of that
19 conduct.

20 The crime of conspiracy to use a weapon of mass
21 destruction has two elements: First, that the defendant and
22 another agreed to use a weapon of mass distraction; and,
23 second, that the defendant knowingly and voluntarily joined in
24 the agreement, intending that the crime of using a weapon of
25 mass destruction be committed.

1 The crime of the use of a weapon of mass destruction
2 has three elements: first, that the defendant knowingly used a
3 weapon of mass destruction; second, that it was knowingly used
4 against a person or against personal property within the United
5 States; and, third, that such property was used in interstate
6 or foreign commerce or in an activity that affects interstate
7 or foreign commerce or, alternatively, that the offense or the
8 results of the offense affected interstate or foreign commerce.

9 "A weapon of mass destruction" means a destructive
10 device, which is defined by statute to include any explosive
11 bomb.

12 "Knowingly" in this context means that the act was
13 done voluntarily and intentionally and not because of mistake
14 or accident.

15 The crime of destruction of property affecting
16 interstate commerce by explosive has four elements: first,
17 that the defendant damaged or destroyed or attempted to damage
18 or destroy, by means of fire or an explosive, any building,
19 vehicle or other personal property; second, that the defendant
20 did so maliciously; third, that he did so by means of fire or
21 an explosive; and fourth, that the building, vehicle or other
22 real or personal property was used in interstate or foreign
23 commerce or in an activity affecting interstate or foreign
24 commerce.

25 "Explosive" in this context means gunpowders, powders

1 used for blasting, blasting materials, fuses other than
2 electric circuit breakers, detonators and other detonating
3 agents, or a device that contains any oxidizing and combustible
4 units or other ingredients in such proportions, quantities or
5 packing that ignition by fire or detonation of the compound,
6 mixture or about device on the part -- or any part thereof may
7 cause an explosion.

8 To act maliciously means to act intentionally or with
9 deliberate disregard of the likelihood that damage or injury
10 will result.

11 "Use in interstate or foreign commerce or in any
12 activity affecting interstate or foreign commerce" means
13 current, active employment for commercial purposes and not
14 merely a passive, passing or past connection to commerce.
15 Property's function must affect interstate commerce.

16 As I instructed you during the liability phase, a
17 person may be found guilty of a non-conspiracy federal offense
18 if he aided or abetted another person in committing the
19 offense. To aid or abet means intentionally to help someone
20 else commit an offense.

21 Aiding and abetting has two elements: first, that
22 someone else committed the charged crime; and, second, that the
23 defendant consciously shared the other person's knowledge of
24 the underlying criminal act, intended to help him, and
25 willfully took some part in the criminal endeavor seeking to

1 help it succeed. An act is done willfully if it is done
2 voluntarily and intelligently -- and intentionally. I'm sorry.
3 Voluntarily and intentionally.

4 A person who aids and abets another to commit a crime
5 need not be present when the underlying criminal act is
6 performed or be aware of all the details of its commission to
7 be guilty of the crime by aiding and abetting, but a general
8 suspicion that a crime may -- an unlawful act or a crime may
9 occur or that something criminal is happening is not enough.
10 Mere presence at the scene of a crime and knowledge that the
11 crime is being committed are also not sufficient to establish
12 aiding and abetting. To be guilty of a crime by aiding and
13 abetting, a person must act in some way to affirmatively assist
14 another person to commit that crime.

15 The government must prove beyond a reasonable doubt
16 that the death or deaths charged in a given count occurred
17 during at least one of the offenses identified in the alleged
18 aggravating factor. Whereas here there are alternate ways of
19 proving the existence of the factor, you must be unanimous as
20 to which alternative or alternatives you find to have been
21 proved.

22 Your determination of which offense or offenses the
23 defendant was committing when he caused the charged death or
24 deaths must be unanimous. Likewise, your determination as to
25 which death, if any, was caused by the given offense must be

1 unanimous.

2 Your finding as to this statutory aggravating factor
3 must be indicated in the appropriate space in Section III of
4 the verdict form.

5 The next statutory aggravating factor alleged by the
6 government with regard to all capital counts is that, in the
7 commission of the particular offenses and in escaping
8 apprehension for the offense, Mr. Tsarnaev knowingly created a
9 grave risk of death to one or more persons in addition to the
10 deceased victim or victims identified in the particular count.

11 To establish the existence of this aggravating factor,
12 the government must prove beyond a reasonable doubt that
13 Mr. Tsarnaev, in committing the offense described in the
14 capital count you're considering, knowingly created a grave
15 risk of death to one or more persons in addition to the
16 deceased victim or victims identified in a particular count.

17 "Knowingly" creating such a risk means that
18 Mr. Tsarnaev was conscious and aware that his conduct in the
19 course of committing the offense might realistically have this
20 result. His conduct cannot merely have been the product of
21 ignorance, mistake or accident. Knowledge, again, may be
22 proved, like anything else. You may consider any statements
23 made or acts done by Mr. Tsarnaev and all the facts and
24 circumstances in the evidence which may aid in a determination
25 of Mr. Tsarnaev's knowledge.

1 "A grave risk of death" means a significant or
2 considerable possibility that another person might be killed.

3 In order to find that the government has proven this
4 factor beyond a reasonable doubt, you must unanimously agree on
5 the particular person or class of persons who were placed in
6 danger by Mr. Tsarnaev's actions.

7 Persons in addition to the victims include innocent
8 bystanders in the zone of danger created by the defendant's
9 acts but do not include other participants in the offense, such
10 as Tamerlan Tsarnaev.

11 Your finding as to this statutory aggravating factor
12 must be indicated in the appropriate space in Section III of
13 the form.

14 The next statutory aggravating factor alleged by the
15 government with regard to certain capital counts is that
16 Mr. Tsarnaev committed the offenses in an especially heinous,
17 cruel and depraved manner in that it involved serious physical
18 abuse to the victim. The government alleges this factor with
19 respect to Counts 1 through 10 and 12 through 15 only, again,
20 omitting the counts specifically relating to Sean Collier.

21 "Heinous" means shockingly atrocious. For the killing
22 to be heinous, it must involve such additional acts of serious
23 physical abuse of the victim as to set it apart from other
24 killings.

25 "Cruel" means the defendant intended to inflict a high

1 degree of pain by serious physical abuse of the victim in
2 addition to killing the victims.

3 "Depraved" means that the defendant relished the
4 killing or showed indifference to the suffering of the victim,
5 as evidenced by the serious physical abuse of the victim.

6 "Serious physical abuse" means a significant or
7 considerable amount of injury or damage to the victim's body,
8 which involves a substantial risk of death, unconsciousness,
9 extreme physical pain, substantial disfigurement or substantial
10 impairment of a function of a bodily member, organ or mental
11 faculty. The defendant must have specifically intended the
12 abuse apart from the killing.

13 Pertinent factors in determining whether a killing was
14 especially heinous, cruel or depraved include infliction of
15 gratuitous violence upon the victim above and beyond that
16 necessary to commit the killing, needless mutilation of the
17 victim's body and helplessness of the victim.

18 For these purposes, the word "especially" should be
19 given its ordinary, everyday meaning of being highly or
20 unusually great, distinctive, peculiar, particular or
21 significant.

22 For each of the capital counts you are considering
23 with respect to this factor, in order to find that the
24 government has satisfied its burden of proof beyond a
25 reasonable doubt that Mr. Tsarnaev committed the offenses in an

1 especially heinous, cruel or depraved manner in that it
2 involved serious physical abuse to the victim, you may only
3 consider the acts of Mr. Tsarnaev. You may not consider the
4 manner in which any accomplice or coconspirator committed the
5 offenses.

6 Again, your finding as to this statutory factor must
7 be indicated in the appropriate space in Section III of the
8 verdict form.

9 The next statutory aggravating factor alleged by the
10 government with regard to certain capital counts is that
11 Mr. Tsarnaev committed the offenses under the particular counts
12 after substantial planning and premeditation to cause the death
13 of a person and to commit an act of terrorism. The government
14 alleges this factor in connection in Counts 1 through 10 and 12
15 through 15 only, again omitting the counts specific to Sean
16 Collier.

17 "Planning" means mentally formulating a method for
18 doing something or achieving some end.

19 "Premeditation" means thinking or deliberating about
20 something and deciding beforehand what to do about it and
21 whether to do it.

22 "Substantial planning and premeditation" means a
23 considerable or significant amount of time -- or amount of
24 planning or premeditation.

25 "An act of terrorism" for these purposes is an act

1 calculated to influence or affect the conduct of the United
2 States government by intimidation or coercion or to retaliate
3 against government conduct.

4 To find the defendant [sic] has satisfied its burden
5 of proving beyond a reasonable doubt that Mr. Tsarnaev engaged
6 in substantial planning and premeditation either to cause the
7 death of a person or to commit an act of terrorism, you must
8 unanimously agree on the particular object of the substantial
9 planning and premeditation, either to cause the death of a
10 person, to commit an act of terrorism or both.

11 Again, your finding as to this statutory aggravating
12 factor must be indicated in the appropriate space in
13 Section III of the verdict form.

14 I think it might be a good idea if everybody just
15 stood and stretched for a minute.

16 MR. WEINREB: Does that include the lawyers?

17 THE COURT: It includes the lawyers. I don't think it
18 includes the gallery.

19 (Brief pause.)

20 THE COURT: The next statutory aggravating factor
21 alleged by the government with regard to certain capital counts
22 is that Mr. Tsarnaev intentionally killed or -- and attempted
23 to kill more than one person in a single criminal episode. The
24 government alleges this factor in connection with Counts 1
25 through 10 and 12 through 15 only, again excluding the counts

1 pertaining exclusively to the death of Sean Collier.

2 To establish the existence of this factor, the
3 government must prove beyond a reasonable doubt that
4 Mr. Tsarnaev intentionally killed or attempted to kill more
5 than one person in a single criminal episode. You must
6 unanimously agree on the particular actual or intended victims
7 or class of intended victims in order to find that this factor
8 has been proved beyond a reasonable doubt.

9 "More than one person" means one or more other people
10 in addition to killing any single named homicide victim.

11 The government has named Krystle Campbell as a victim
12 in Counts 1, 2, 3, 6, 7, 8, 12 and 13. It has named Lingzi Lu
13 and Martin Richard as victims in Counts 1, 4, 5, 6, 9, 10, 14
14 and 15. It has named Sean Collier as a victim, in relevant
15 part, in Counts 1 and 6.

16 "Intentionally killing a person" means killing a
17 person on purpose; that is, willfully, deliberately or with a
18 conscious desire to cause a person's death, and not just
19 accidentally or involuntarily.

20 "Attempting to kill" means purposely doing some act
21 which constitutes a substantial step beyond mere preparation or
22 planning toward killing a person and doing so with an intent to
23 cause a person's death.

24 "A single criminal episode" is an act or series of
25 related criminal acts which occur within a relatively limited

1 time and place or are directed at the same person or persons or
2 are a part of a continuous course of conduct related in time,
3 place or purpose.

4 Again, you may, but are not required to, infer that a
5 person of sound mind intended the ordinary, natural and
6 probable consequences of his knowing and voluntary acts. Thus,
7 you may infer from Mr. Tsarnaev's conduct that he intended to
8 kill a person if you find, first, that he was a person of sound
9 mind; second, that the victim's death was an ordinary, natural
10 and probable consequence of his acts, even if the death did not
11 actually result, in the case of an attempt; and, third, that
12 Mr. Tsarnaev committed these acts knowingly and voluntarily.
13 Once again, you're not required to make any such inference.

14 Your finding as to this statutory factor again must be
15 indicated in the appropriate place on Section III of the
16 verdict slip.

17 The final statutory aggravating factor alleged by the
18 government with regard to certain capital counts is that
19 Mr. Tsarnaev is responsible for the death of a victim, Martin
20 Richard, who was particularly vulnerable due to age. The
21 government alleges this factor in connection with Counts 1, 4,
22 5, 6, 9, 10, 14 and 15 only.

23 The word "youth" should be given its ordinary,
24 everyday meaning. "Youth" refers to a period when one is young
25 and has not yet reached adulthood. A juvenile is a youth.

1 To find that the government has satisfied its burden
2 of proving beyond a reasonable doubt that Mr. Tsarnaev
3 committed the offenses on a victim who was particularly
4 vulnerable due to youth, you must unanimously agree that the
5 victim was vulnerable due to his youth and that there was a
6 connection between the victim's vulnerability and the offense
7 committed upon him. A connection does not necessarily mean
8 that the defendant targeted the victim because of the
9 vulnerability; it means that once targeted, the victim was more
10 susceptible to death because of the vulnerability.

11 Again, your finding as to this statutory aggravating
12 factor must be indicated in the appropriate place on -- in
13 Section III of the verdict form.

14 Finally, let me reiterate that if, with respect to any
15 capital count, you do not unanimously find the government has
16 proven beyond a reasonable doubt at least one of the several
17 statutory aggravating factors, your deliberations as to that
18 count are concluded.

19 Let me turn now to non-statutory aggravating factors.
20 If you have unanimously found that the government has proven
21 beyond a reasonable doubt that the defendant was 18 years of
22 age or older at the time of the particular offense, has proved
23 the existence of a particular -- as to that particular count of
24 at least one gateway or threshold intent factor, and at least
25 one statutory aggravating factor alleged by the government, you

1 must then consider whether the government has proven the
2 existence of any alleged non-statutory aggravating factors with
3 regard to that same count.

4 You must agree unanimously and separately as to each
5 count that the government has proved beyond a reasonable doubt
6 the existence of any of the alleged non-statutory aggravating
7 factors before you may consider that statutory -- that
8 non-statutory aggravating factor in your deliberations. Again,
9 any such finding must be based on Mr. Tsarnaev's actions and
10 intent.

11 The law permits you to consider and discuss only the
12 six non-statutory aggravating factors specifically claimed by
13 the government and listed below. You're not free to consider
14 any other facts in aggravation that you may think of on your
15 own.

16 The non-statutory aggravating factors alleged by the
17 government with regard to the capital counts are as follows:
18 First, in conjunction with committing acts of violence and
19 terrorism, Mr. Tsarnaev made statements suggesting that others
20 would be justified in committing additional acts of violence
21 and terrorism against the United States. The government
22 alleges this factor in connection with all of the capital
23 counts.

24 Second, the government alleges that Mr. Tsarnaev
25 caused injury, harm and loss to Krystle Marie Campbell and her

1 family and friends in Counts 1, 2, 3, 6, 7, 8, 12 and 13; to
2 Martin Richard and his family and friends, Counts 1, 4, 5, 6,
3 9, 10, 14, and 15; to Lingzi Lu and her family and friends,
4 Counts 1, 4, 5, 6, 9, 10, 14 and 15; and to Officer Sean
5 Collier and his family and friends, Counts 1, 6, 16, 17 and 18.

6 The third non-statutory aggravating factor alleged is
7 that Mr. Tsarnaev targeted the Boston Marathon, an iconic event
8 that draws large crowds of men, women and children to its final
9 stretch, making it especially susceptible to the act and
10 effects of terrorism. The government alleges this factor in
11 connection with Counts 1 through 10 and Counts 12 through 15
12 only.

13 The government alleges that Mr. Tsarnaev demonstrated
14 a lack of remorse. The government alleges this factor in
15 connection with all of the capital counts.

16 The government alleges that Mr. Tsarnaev murdered
17 Officer Sean Collier, a law enforcement officer who was engaged
18 in the performance of his official duties at the time of his
19 death. The government alleges this factor in connection with
20 Counts 1, 6, 16, 17 and 18 only.

21 Finally, the government alleges that Mr. Tsarnaev
22 participated in additional uncharged crimes of violence,
23 including assault with a dangerous weapon, assault with intent
24 to maim, mayhem and attempted murder on April 15 in 2013 in
25 Boston, Massachusetts -- that's for Counts 1 through 10 and 12

1 through 15 -- and on or about April 19, 2013, in Watertown,
2 Massachusetts. That relates to Counts 1 through 10 and 12
3 through 18. That is all the capital counts.

4 These non-statutory aggravating factors are set forth
5 in the verdict slip, and they are generally self-explanatory
6 and do not require further amplification or instruction. I do
7 want to provide further instructions, however, regarding two of
8 the non-statutory aggravating factors.

9 The first non-statutory aggravating factor I would
10 like to address is the government's allegation that
11 Mr. Tsarnaev has, quote, demonstrated a lack of remorse. In
12 determining whether the government has proven this fact beyond
13 a reasonable doubt, you may not consider the fact that the
14 defendant has not testified or made any statement here in
15 court. I remind you the defendant has a constitutional right
16 not to testify or speak both at the first phase of the trial
17 and at his sentencing hearing.

18 Again, there may be many valid reasons why a defendant
19 would exercise his constitutional right not to testify. You
20 must, therefore, not draw any conclusion against him as to any
21 issue from his failure to testify at this stage of the trial.

22 The second non-statutory factor on which I need to
23 provide some additional information is the allegation that
24 Mr. Tsarnaev participated in uncharged crimes of violence,
25 either directly or as an aider and abetter, as I've previously

1 defined that term. To find the defendant committed -- and
2 you'll recall that I listed the ones that -- and you'll see it
3 in the verdict form, lists the other uncharged crimes the
4 government claims.

5 So to find the defendant committed an assault with a
6 dangerous weapon, the government would be required to prove
7 that the defendant forcibly assaulted another -- a person with
8 a deadly or dangerous weapon; and, secondly, the assault was
9 done voluntarily and intentionally.

10 To find the defendant the committed an assault with
11 the intent to maim, you would be required to unanimously and
12 beyond a reasonable doubt find that the defendant had forcibly
13 assaulted a person; that the assault was done voluntarily and
14 intentionally; and, third, that the defendant intended to cause
15 a permanent disability.

16 An assault is any intentional and voluntary attempt or
17 threat to do injury to the person of another. When coupled
18 with the apparent present ability to do so sufficient to put
19 the person against whom the attempt is made in fear of
20 immediate bodily harm.

21 "Forcibly" means by the use of force. Physical force
22 is sufficient, and actual physical contact is not required.

23 You may also find that a person who, in fact, has the
24 present ability to inflict bodily harm upon another and who
25 threatens or intends to inflict bodily harm upon such person

1 acts forcibly. In such a case, the threat must be a present
2 one.

3 A deadly and dangerous weapon is an object used in a
4 manner likely to endanger life or inflict serious bodily harm.
5 A weapon intended to cause death or danger but fails to do so
6 because of a defective component is, nevertheless, a deadly or
7 dangerous weapon.

8 To find the defendant committed the uncharged crime of
9 mayhem, you must find beyond a reasonable doubt and unanimously
10 the defendant maliciously disabled or disfigured someone
11 permanently or deprived someone else of a limb, organ or part
12 of his or her body; second, that when the defendant acted, he
13 intended to permanently disable or disfigure the other person
14 or deprive the person of a limb, organ or part of his or her
15 body.

16 To act maliciously means to act with the intent or
17 with the willful -- to do that, or with willful disregard of
18 the likelihood that damage or injury would result.

19 To find the defendant committed the uncharged crime of
20 attempted murder, you must find unanimously and beyond a
21 reasonable doubt that the defendant intend to commit the crime
22 of murder; and, second, that the defendant engaged in a
23 purposeful act that, under the circumstances as he believed
24 them to be, amounted to a substantial step toward the
25 commission of that crime and strongly corroborated his criminal

1 intent.

2 "A substantial step" is an act in furtherance of the
3 criminal scheme. It must be something more than mere
4 preparation but less than the last act necessary before the
5 substantive crime is completed. The substantial step may
6 itself prove the intent to commit the crime but only if it
7 unequivocally demonstrates such an intent.

8 "Murder" is defined as the unlawful killing of a human
9 being with malice aforethought.

10 "Malice aforethought" means an intent at the time of
11 the killing willfully to take the life of a human being or an
12 intent willfully to act in a callous and wanton disregard of
13 the consequences of human life. But malice aforethought does
14 not necessarily imply any ill will, spite or hatred towards the
15 individual killed.

16 In determining whether a victim was unlawfully killed
17 with malice aforethought, you should consider all the evidence
18 considering the facts and circumstances preceding, surrounding
19 and following the killing which tend to shed light upon the
20 question of intent.

21 Again, your findings regarding these non-statutory
22 aggravating factors must be separate as to each count and
23 unanimous. You must also unanimously agree beyond a reasonable
24 doubt that the non-statutory aggravating factor alleged by the
25 government is, in fact, aggravating. As I mentioned at the

1 beginning, an aggravating factor is a fact or circumstance that
2 would tend to support the imposition of the death penalty.

3 In the event that you unanimously find beyond a
4 reasonable doubt that a particular alleged non-statutory
5 aggravating factor applies to all of the relevant capital
6 counts for which you have found the defendant 18 years or older
7 and at least one gateway factor and at least one statutory
8 aggravating factor, then you are to indicate that finding on
9 the appropriate line in Section IV of the verdict form. And
10 you'll see that again; that is presented as the first option.

11 In the event that you unanimously find a particular
12 non-statutory aggravating factor applies to some but not all of
13 the relevant counts, you're to indicate that finding on the
14 appropriate line in Section IV and also to identify on the line
15 provided by count number the particular counts to which you
16 find the non-statutory aggravating factor applies.

17 If you do not unanimously find that a non-statutory
18 aggravating factor has been proven beyond a reasonable doubt
19 with regard to any of the relevant capital crimes, you should
20 indicate that in Section IV of the form.

21 Now, unlike the rules relating to the gateway factors
22 or the statutory aggravating factors, you're not required to
23 find a non-statutory aggravating factor with regard to a
24 particular count before you may consider the death penalty as a
25 possible sentence for that count. The law requires only that

1 before you may consider an alleged non-statutory aggravating
2 factor as to any particular capital count, you must first
3 unanimously agree that the government has proven beyond a
4 reasonable doubt the existence of that factor as to that count.

5 After you've completed your findings regarding the
6 existence or non-existence of non-statutory aggravating
7 factors, you should proceed to Section V of the verdict form to
8 consider whether any mitigating factors exist. Again, remember
9 unless you're unanimous that the existence of a particular
10 statutory or non-statutory factor has been proven by the
11 government beyond a reasonable doubt, you may not give that
12 factor any consideration beyond -- in your deliberations. That
13 is, as to any statutory or non-statutory factor you do not find
14 to be proved, you may not consider that in your deliberations.

15 Let me turn now to mitigating factors. Before you may
16 consider the appropriate punishment for any one of the capital
17 counts for which you have unanimously found that Mr. Tsarnaev
18 was 18 years old or older and the existence of at least one
19 gateway factor and at least one statutory aggravating factor,
20 you must also consider whether Mr. Tsarnaev has proved the
21 existence of any mitigating factors pertinent to the question
22 of punishment for that particular count.

23 A mitigating factor is not offered to justify or
24 excuse Mr. Tsarnaev's conduct; instead, a mitigating factor is
25 a fact about Mr. Tsarnaev's life or character or about the

1 circumstances surrounding the particular capital offense or
2 anything else relevant that would suggest in fairness that life
3 in prison without possibility of release is a more appropriate
4 punishment than a sentence of death.

5 Unlike aggravating factors, which you must unanimously
6 find proved beyond a reasonable doubt in order for you to even
7 consider them in your deliberations, the law does not require
8 unanimity with respect to mitigating factors. Any one juror
9 who's persuaded of the existence of a mitigating factor must
10 consider it in his or her sentencing decision.

11 Furthermore, as I've said, it is Mr. Tsarnaev's burden
12 to establish a mitigating factor only by a preponderance of the
13 evidence. I've previously instructed you about that standard
14 of proof.

15 So Mr. Tsarnaev alleges or urges as mitigating factors
16 the following: first, that he was 19 years old at the time of
17 the offenses; second, that he has had no prior history of
18 violent behavior; third, that he acted under the influence of
19 his older brother; fourth, whether because of Tamerlan's age,
20 size, aggressiveness, domineering personality, privileged
21 status in the family, traditional authority as the eldest
22 brother or other reasons, Dzhokhar Tsarnaev was particularly
23 susceptible to his older brother's influence; fifth, Dzhokhar
24 Tsarnaev's brother, Tamerlan, planned, led and directed the
25 marathon bombing; sixth, Dzhokhar Tsarnaev's brother, Tamerlan,

1 was the person who shot and killed Officer Sean Collier;
2 seventh, Dzhokhar Tsarnaev would not have committed the crimes
3 but for his older brother, Tamerlan;

4 Eighth, Dzhokhar Tsarnaev's teachers in elementary
5 school, middle school and high school knew him to be hard
6 working, respectful, kind and considerate; ninth, Dzhokhar
7 Tsarnaev's friends in high school and college knew him to be
8 thoughtful, caring and respectful of the rights and feelings of
9 others; tenth, Dzhokhar Tsarnaev's teachers and friends still
10 care for him; 11, Dzhokhar Tsarnaev's aunts and cousins love
11 and care for him;

12 12, mental illness and brain damage disabled Dzhokhar
13 Tsarnaev's father; 13, Dzhokhar Tsarnaev was deprived of needed
14 stability and guidance during his adolescence by his father's
15 mental illness and brain damage; 14, Dzhokhar Tsarnaev's
16 father's illness and disability made Tamerlan the dominant male
17 figure in Dzhokhar's life; 15, Dzhokhar Tsarnaev was deprived
18 of the stability and guidance he needed during his adolescence
19 due to his mother's emotional volatility and religious
20 extremism; 16, Dzhokhar Tsarnaev's mother facilitated his
21 brother, Tamerlan's radicalization;

22 17, Tamerlan Tsarnaev became radicalized first and
23 then encouraged his younger brother to follow him; 18, Dzhokhar
24 Tsarnaev's parents' return to Russia in 2012 made Tamerlan the
25 dominant adult male -- the adult in Dzhokhar's life; 19,

1 Dzhokhar Tsarnaev is likely -- is highly unlikely to commit,
2 incite or facilitate any acts of violence in the future while
3 serving a life-without-release sentence in federal custody; 20,
4 the government has the power to severely restrict Dzhokhar
5 Tsarnaev's communications with the outside world; 21, Dzhokhar
6 Tsarnaev has expressed sorrow and remorse for what he did and
7 for the suffering he caused.

8 In Section V of the verdict form you will be -- after
9 each of the proposed mitigating factors, you are to indicate
10 the total number of jurors who individually find that that
11 particular mitigating factor has been established by the
12 defendant by a preponderance of the evidence. As I say, that
13 can be any number because any number of jurors could make the
14 decision. So it could be anywhere from zero to 12.

15 In addition to the mitigating factors specifically
16 raised by Mr. Tsarnaev, the law also permits each of you to
17 consider anything about the offense, the circumstances of the
18 offense or anything about Mr. Tsarnaev's background, record or
19 character or anything else relevant that you individually
20 believe should mitigate in favor of the imposition of life
21 imprisonment without the possibility of release instead of the
22 death penalty.

23 In other words, the law does not limit your
24 consideration of mitigating factors to those that have been
25 proposed or articulated by the defendant. Accordingly, if

1 there are any mitigating factors not argued by the attorneys
2 for Mr. Tsarnaev by which any juror, on his or her own or with
3 others, finds to be established by a preponderance of the
4 evidence, the juror's free to consider such factor or factors
5 in his own determination as to the appropriate sentence. And
6 you will see in Section V of the verdict form you're able to
7 identify any such additional mitigating factors that one or
8 more of you independently find to exist by a preponderance of
9 the evidence.

10 Please note the existence of a mitigating factor is a
11 distinct consideration from what weight, if any, should
12 ultimately be given to that factor in your deliberations. For
13 example, any number of jurors might first find that a
14 particular mitigating factor exists, but those jurors as
15 individuals might later choose to give that same mitigating
16 factor differing levels of significance in the weighing
17 process. With this distinction in mind, Section V of the
18 verdict form only asks you to report the total number of jurors
19 who individually find the existence of a particular mitigating
20 factor to be established by a preponderance of the evidence.

21 In addition, you should understand that the law does
22 not require that there be a connection between the mitigating
23 evidence and the crime committed, though you may conclude that
24 there is. It is not necessary, for example, for the defense to
25 prove that adverse circumstances in the defendant's childhood

1 or family background caused him to commit the crime -- the
2 offense. Whether any mitigating factor has a direct connection
3 to the crime does not affect its status as a -- mitigating
4 circumstances that you're required to consider in the weighing
5 process.

6 After you've completed your findings with respect to
7 the existence or nonexistence of mitigating factors, you should
8 then proceed to Section VI of the verdict form to weigh the
9 aggravating factors and the mitigating factors with regard to
10 each of the counts for which you have unanimously found that
11 the defendant was 18 years old at the time of the offense and
12 you found the existence of at least one gateway factor and at
13 least one statutory aggravating factor.

14 If you unanimously find beyond a reasonable doubt that
15 the government has proven that the defendant was 18 years or
16 older at the time of the offense and the existence of at least
17 one gateway or threshold intent factor and at least one
18 statutory aggravating factor with regard to any capital count;
19 and after you determine whether the government has proven
20 beyond a reasonable doubt the existence of any non-statutory
21 aggravating factors with regard to that count; and, further,
22 after you consider whether Mr. Tsarnaev has proven, by a
23 preponderance of the evidence, the existence of any mitigating
24 factors, then you must engage in a weighing process with regard
25 to that count.

1 You must consider whether you are unanimously
2 persuaded that the aggravating factors sufficiently outweigh
3 any mitigating factors or, in the absence of any mitigating
4 factors, that the aggravating factors are themselves sufficient
5 to call for a sentence of death on that particular count that
6 you are considering.

7 You are to conduct this weighing process separately
8 with respect to each of the capital counts for which you have
9 found the defendant was 18 years of age or older and you have
10 found at least one gateway or threshold intent factor and at
11 least one statutory aggravating factor.

12 Each juror must individually decide whether the facts
13 and circumstances in this case as to each count call for death
14 as the appropriate sentence. In determining the appropriate
15 sentence for any particular capital count you're considering,
16 each of you must independently weigh the aggravating factor or
17 factors that you unanimously found to exist with regard to that
18 count, whether those aggravating factors are statutory or
19 non-statutory; and each of you must weigh any mitigating
20 factors that you individually or with others have found to
21 exist.

22 You're not to weigh, in the process, any of the
23 gateway or threshold intent factors. In the weighing process
24 you must avoid any influence of passion, prejudice or any of
25 the arbitrary considerations. Your deliberations must be based

1 on your reasoned evaluation of the evidence as you have seen it
2 and heard it and on the law which I am instructing you in.

3 Now, you've heard evidence about the impact of the
4 deaths of the deceased victims' -- deaths on the deceased
5 victims' families -- family members and friends. You may not
6 consider that evidence in deciding whether any of the gateway
7 or statutory aggravating factors have been proved.

8 If you have found with respect to any particular count
9 that Mr. Tsarnaev was 18 years old or older at the time of the
10 offense and have found the existence of a gateway factor and at
11 least one statutory aggravating factor, then you may consider
12 the victim impact evidence in deciding what the appropriate
13 punishment should be.

14 Again, I remind you that you are not to be influenced
15 by speculation concerning what sentence you think anyone else,
16 including victims' families, might wish to see imposed on the
17 defendant. You have been selected to decide this case because
18 you committed to be fair and impartial in all respects, and you
19 made your oath or affirmation to that effect. It is for you
20 alone, the fair-minded jurors, to decide the appropriate
21 punishment in this case based on your careful evaluation of the
22 evidence that you have heard and seen.

23 I also want to caution you again, as I did during the
24 trial, that you are not to consider any possible financial
25 costs to the government that may be involved in carrying out

1 either the death penalty or life imprisonment without the
2 possibility of release. This is so for two reasons: First,
3 whether one sentence may be more expensive than another is
4 simply not a proper basis upon which to decide a matter as
5 grave as this; and, second, even it were proper to impose
6 either the death penalty or life imprisonment to save money,
7 there's no evidence before you as to which sentence, if either,
8 is actually more expensive to carry out. For both of these
9 reasons, it would be improper for you to base any part of your
10 decision on the notion that the government could save money by
11 imposing one sentence rather than another. And that is, again,
12 a subject that should not even be discussed by you in the jury
13 room.

14 Again, whether or not the circumstances in this case
15 call for the sentence of death is a decision that the law
16 leaves entirely to you. All 12 jurors must agree that death
17 is, in fact, the appropriate sentence in order for it to be
18 imposed. And no juror is ever required to impose a sentence of
19 death. The decision is yours, as individuals, to make.

20 The process of weighing aggravating and mitigating
21 factors against each other or weighing the aggravating factors
22 alone, if you find no mitigating factors, in order to determine
23 the proper punishment is by no means a mathematical or
24 mechanical process. In other words, you should not simply
25 count the total number of aggravating and mitigating factors

1 and reach a decision based on which number is greater. Rather,
2 you should consider the weight and significance of each factor.
3 As I've said, in carefully weighing these factors, you are
4 called upon to make a unique, individual judgment about the
5 sentence Mr. Tsarnaev should receive.

6 The law contemplates that different factors may be
7 given different weights or values by different jurors. Thus,
8 you may find that one mitigating factor outweighs all
9 aggravating factors combined or that aggravating factors proved
10 do not, standing alone, justify the imposition of a sentence of
11 death. Similarly, you may instead find that a single
12 aggravating factor sufficiently outweighs all mitigating
13 factors combined so as to justify a sentence of death.

14 Any one of you is free to decide that a death sentence
15 should not be imposed so long as, based on the evidence and
16 your sense of justice, you conclude that the proven aggravating
17 factors do not sufficiently outweigh the mitigating factors
18 such that the death penalty should be imposed. Each juror is
19 to individually decide what weight or value is to be given to
20 any particular aggravating or mitigating factor in the
21 decision-making process.

22 Bear in mind, of course, that in order to find that a
23 sentence of death is appropriate for a particular count, the
24 jurors must be unanimous in their conclusion that the
25 aggravating factor or factors proven as to that count

1 sufficiently outweigh any mitigating factors found or, in the
2 absence of any mitigating factors, that the aggravating factors
3 alone are sufficient to call for a sentence of death.

4 In the event that you unanimously find as to all the
5 capital counts that the aggravating factor or factors found to
6 exist sufficiently outweigh the mitigating factor or factors
7 found to exist or, in the absence of any mitigating factors,
8 that the aggravating factor or factors alone are sufficient to
9 justify a sentence of death, then you will indicate that in
10 Section VI of the verdict form.

11 In the event you -- that you unanimously find that a
12 sentence of life in prison without the possibility of release
13 is the appropriate sentence for Mr. Tsarnaev for all of the
14 capital counts, then you would indicate that in Section VI,
15 which is the second option.

16 In the event that you unanimously find that some of
17 the capital counts -- for some of the capital counts that the
18 aggravating factor or factors found to exist sufficiently
19 outweigh the mitigating factor or factors found to exist or, in
20 the absence of mitigating factors, the aggravating factor or
21 factors are alone sufficient to justify death, with respect to
22 those counts, please indicate also in Section VI and then
23 identify those counts by number.

24 In the event that the jury is unable to reach a
25 unanimous verdict in favor of a death sentence or in favor of a

1 life sentence for any of the capital counts, please so indicate
2 in Section VI of the verdict form. Before you reach any
3 conclusion based on a lack of unanimity on any count, you
4 should continue your discussions until you are fully satisfied
5 that no further discussion will lead to a unanimous decision.

6 After you have completed your sentence determination
7 in Section VI, regardless of what the decision determination
8 was, continue on to Section VII and complete the certificate
9 regarding the determination of sentence.

10 As I instructed you at the beginning of the penalty
11 phase, in your consideration whether the death sentence is
12 appropriate you must not consider the race, color, religious
13 beliefs, national origin or sex of either Mr. Tsarnaev or of
14 the victims. You are not to return a sentence of death unless
15 you would return a sentence of death for the crime in question
16 without regard to the race, color, religious beliefs, national
17 origin or sex of either Mr. Tsarnaev or any victim.

18 To emphasize the importance of this consideration,
19 Section VIII of the verdict form contains a certification
20 statement. Each juror should carefully read -- when you've
21 completed your deliberations, each juror should carefully read
22 the statement and sign your name in the appropriate place if
23 the statement accurately reflects the manner in which each of
24 you reached your individual decision.

25 So that is the conclusion of my instructions at this

1 stage. We'll have some further -- few thing to say later. We
2 will now turn to the closing statements by counsel. And when
3 they have finished, I will have some final issues to discuss
4 with you.

5 As we did before, the order of the closing arguments
6 is the government will proceed first, followed by the
7 defendant, followed by a brief rebuttal by the government.
8 Again, at least we should -- I think perhaps we should actually
9 take a short break. Very short.

10 THE CLERK: All rise for the Court and the jury. The
11 Court will take a very short recess.

12 (The Court and jury exit the courtroom and there is a
13 recess in the proceedings at 11:05 a.m.)

14 THE CLERK: All rise for the Court and the jury.

15 (The Court and jury enter the courtroom at 11:26 a.m.)

16 THE COURT: All right.

17 THE CLERK: Be seated.

18 THE COURT: All right. We're ready for the
19 government's main closing argument.

20 Mr. Mellin?

21 MR. MELLIN: Thank you, your Honor. Your Honor, may I
22 ask that the feed be shifted to the government so...

23 THE COURT: Yes. Tell me when you're ready.

24 MR. MELLIN: Thank you.

25 THE COURT: Go ahead. I'm just waiting for you to get

1 night.

2 MS. CONRAD: You can't do that.

3 MS. CLARKE: Can we get our notes?

4 THE COURT: This is the time it's usually done while
5 it's still possible to correct any misstatement.

6 (Discussion off the record.)

7 MS. CONRAD: Are you going to have them begin
8 deliberating?

9 THE COURT: Yeah. They'll have a half an hour, 45
10 minutes, just so they -- really to make the point of beginning.

11 MR. BRUCK: Part of this is to object to the
12 instructions you're about to give. So is this the time for
13 that too?

14 MS. CONRAD: No, we'll have to come back.

15 THE COURT: I think I have to give it first. So if
16 you want me to do that and then we'll do everything.

17 MR. BRUCK: Then we'll do everything. Let's do that.

18 THE COURT: All right.

19 (In open court:)

20 THE COURT: Jurors, I'm going to just complete my
21 instructions with a few relatively brief remarks.

22 I've outlined for you the rules of law applicable to
23 your consideration of the death penalty and the process by
24 which you should determine the facts and weigh the evidence.
25 And in a few moments, you'll retire to the jury room.

1 The importance of your deliberations should be
2 obvious. I remind you that you can return a decision
3 sentencing Mr. Tsarnaev to death only if all 12 of you are
4 unanimously persuaded that the death penalty is, in fact,
5 appropriate. And, again, I remind you that no juror is ever
6 required by law to impose a death sentence.

7 When you're in the jury room, please discuss all
8 aspects of these sentencing issues among yourselves with candor
9 and frankness, but also with a due regard and respect for the
10 opinions of one another. This has been a long case, and you
11 have spent a lot of time together as jurors. Regardless of any
12 personal regard you may have for each other, you must each
13 decide this case for yourself. No juror should surrender his
14 or her own conscientious conclusion merely because other jurors
15 might feel otherwise or simply to get to a unanimous decision.

16 Remember that the parties and the Court are relying on
17 you to give full, considered and mature consideration to the
18 question of sentencing. By so doing, you carry out, to the
19 fullest, your oath as jurors, that you will well and truly try
20 the issues of this case and render a just verdict.

21 As with the prior phase, if it becomes necessary
22 during your deliberations to communicate with me for any
23 reason, simply send a note signed by the foreman of the jury.
24 If you send a note, do not indicate any decision-making on any
25 of the issues that are before you or provide any details about

1 your progress. And additionally, do not attempt to communicate
2 with the Court or any other court personnel, except the court
3 security officer by telling him that you have the need for him
4 to convey it, other than in writing, a signed writing. There
5 will be no oral communications. Any questions you have, you
6 should present in writing.

7 When you have reached a decision, send me a note
8 signed by the foreman that you have reached a decision. Do not
9 indicate on the note what the decision is. And in no
10 communication with the Court prior to a verdict should you ever
11 give a numerical count of where the jury stands in its
12 deliberations on any issue.

13 Whichever decision you reach, the foreman must also
14 sign and fill out the verdict form accordingly, according to
15 the verdict, and be prepared to report to the Court your
16 findings as to the issues in the verdict form, the defendant's
17 age, the gateway, aggravating and mitigating factors and your
18 sentencing decision.

19 As we did in the prior phase, you will have an
20 envelope in the room that at the end of the day, each day, as
21 you deliberate, you will put the verdict slip inside the
22 envelope and seal it, and it will remain sealed and be returned
23 to you in a sealed condition the following day and you will
24 remove it from the envelope yourselves.

25 I note for the record that you will not have your

1 cellular phones, PDAs or other electronic devices during the
2 deliberations. I understand they have already been collected
3 from you and will not be returned to you until the court
4 recesses each day.

5 Of course, as I previously said, it would be improper
6 and a violation of your oath as a juror to conduct any outside
7 research or investigation on the Internet or otherwise to -- or
8 otherwise, or to communicate with anyone, including your fellow
9 jurors, outside the deliberations conducted by the jury as a
10 whole in the jury room.

11 As in the first phase, only 12 jurors will be
12 deliberate. The alternates remain important because you may be
13 called to serve in the event that a deliberating juror is no
14 longer able to participate in the deliberations. But as
15 before, the alternate jurors will be separated from the
16 deliberating jurors during the deliberations.

17 And among the alternate jurors, you're not to discuss
18 anything about the case or the penalty among each other. In
19 other words, you're not to act as if you were also a
20 deliberating jury.

21 When the court is in session, you will return to the
22 courtroom as well so that you may hear any responses to jury
23 questions and any other remarks that are necessary from me.

24 Let me conclude by reminding you again that nothing I
25 have said in my instructions and nothing I've done or said

1 during the course of the trial has been said or done to suggest
2 to you what I think the outcome should be. What the sentencing
3 decision should be is your exclusive duty and responsibility.

4 Let me see counsel again at the side, please.

5 (Discussion at sidebar and out of the hearing of the
6 jury:)

7 MR. BRUCK: Well, the first objection we'd like to
8 make is the Court's refusal of our Instruction No. 3, which is
9 the instruction that -- concerning the consequences of a
10 deadlock.

11 THE COURT: Okay. All right.

12 MR. BRUCK: And I understand that the rule may require
13 me to spell that out unless --

14 THE COURT: I don't think so.

15 MS. CONRAD: The First Circuit does. You can't just
16 refer to it by the number. You actually have to state what was
17 requested and what's not --

18 MR. BRUCK: No, that's not the one.

19 THE COURT: I think that's stating a summary.

20 MR. BRUCK: Maybe I should read it to be sure.

21 MS. CONRAD: The First Circuit says -- it's very
22 short. The First Circuit says you have to read it.

23 MR. BRUCK: The request --

24 THE COURT: Well, I'm concerned about the jury hearing
25 it.